A REVIEW OF THE IMPORTANT CONSTRUCTION AND CONTRACT LAW CASES FOR 2017

PAPER PRESENTED TO THE BUILDING DISPUTE PRACTITIONERS SOCIETY (VICTORIAN DIVISION) ON 29 NOVEMBER 2017

IMERVA CORPORATION PTY LTD v. KUNA

[2017] VSCA 168.

S.40 *DOMESTIC BUILDING CONTRACTS ACT* 1995 - WARNING REQUIRED IF CONTRACTING OUT OF THE LIMITS ON PROGRESS PAYMENTS UNDER S.40(2) - REGULATION 12(a) OF DOMESTIC BUILDING CONTRACT REGULATIONS 2007 - WHETHER THE WARNING WAS GIVEN WHERE FORM 1 SIGNED BY INITIALING THE FOOT OF THE PAGE – HELD THAT THE WARNING WAS NOT SIGNED IN ACCORDANCE WITH REGULATION 12(a) – S.40 PRECLUDED THE AVAILABILITY OF EQUITABLE ESTOPPEL

1. This was a case that went from the VCAT through to the Court of Appeal. It concerned s.40 of the *Domestic Building Contracts Act* 1995 which imposes limits upon the amounts which a builder can demand or recover or retain by way of progress payments for various stages of the works from base stage through to fixing stage.

2. However the contracting parties are not bound by this regime because s.40(4) provides that it does not apply, "*if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations*".

3. Under Regulation 12 of the Domestic Building Contract Regulations 2007:-
   "*… when the parties to a major domestic building contract agree that sections 40(2) and (3) of the Act do not apply to that contract, the manner of agreement is to include in the major domestic building contract –*
   (a) a warning in the form of Form 1 in the Schedule which is signed by the building owner before the execution of the contract; and
   (b) a clause in the form of Form 2 in the Schedule".

4. The case concerned a building contract between a Mr and Mrs Kuna who, as owners entered into a major domestic building contract with the builder Imerva Corporation Pty Ltd, to construct two attached two storey townhouses above a basement carpark.

5. The Kunas' son-in-law Mr Paritsi was an experienced building construction manager and he was appointed as the Kunas' nominated representative under the contract.

6. On 14 September 2012 the director of Imerva, Mr Schachter, emailed Mr Paritsi the first draft of the contract. The draft included a method of progress payments for the construction of the townhouses that differed substantially from that prescribed under the Act.

7. On 9 November 2012 the Kunas' daughter, Mrs Kuna-Paritsi, who was a former solicitor in a large construction firm, but who as at 2012 had not practiced for many years, sent Mr Schachter an email proposing a special condition that, "*The parties' agreement as to which method will be used for progress payments … is subject to approval by the lending body*". This condition was not ultimately included in the contract.

8. Schedule 3 to the building contract provided for two alternative methods for progress payments. Method 1 was the method prescribed under s.40(1) and (2) of the Domestic Building Contracts Act.

9. Method 2 was in accordance with Regulation 12(b), Form 2 of the Regulations:-
"*Method 2*
PROGRESS PAYMENTS
NOTES
Under Method 2 the Builder and the Owner must agree on stages at which Progress payments must be made. Remember, the Owner must read and sign Form 1 of the Regulations (refer to Attachment 1) before using Method 2.
FORM 2 OF THE REGULATIONS – REGULATION 6(B)
The parties agree –
(i) that the Progress Payments fixed by section 40 of the Domestic Building Contracts Act 1995 do not apply and
(ii) that instead the percentage of the contract price and amounts payable are as follows …".

10. This was followed by a table setting out 20 stages with relevant stages and amounts (refer paragraph 11 of the judgment).

11. Attachment 1 to the contract reflected Regulation 12(a) and Form 1 of the Regulations (albeit that it mistakenly referenced Regulation 6(A) instead of Regulation 12(a)). The most relevant parts of Attachment 1 are set out below (refer paragraph 12 of the judgment):-
"*Attachment 1*
FORM 1 OF THE REGULATIONS – REGULATION 6(A)
WARNING TO OWNER – CHANGE OF LEGAL RIGHTS
Section 40 of the Domestic Building Contracts Act 1995 provides that a Builder cannot charge more than a fixed percentage of the total contract price at the completion of each stage of building a home. The Act also allows the parties to agree in writing to change the stages and the percentage of the Contract Price to be paid at the completion for each stage.
There are several ways in which a particular Contract can vary from the normal, and it is these exceptional cases which have caused the law to allow for these changes. Examples would include:

...

I acknowledge that I have read this warning before signing the Contract.

Owner

NAME *ANTON & JAGA KUNA*

SIGNATURE _____

WHEN METHOD 2 IS TO BE USED FOR THE PROGRESS PAYMENTS ALL OWNERS MUST SIGN'.

12. When the Contract was signed by the parties the Kunas' initialed each page of the Contract on the right hand corner of the page including Attachment 1. However no signatures were inserted in the space designated for "*SIGNATURE*" by Mr and Mrs Kuna in Attachment 1 to the Contract. There was nothing to differentiate the Kunas' assent to Attachment 1 from any other page of the Contract viz., each page of the Contract was initialed on the right hand corner of the foot of the page. Nor was there any deletion of Method 1. The Contract was signed by and Mr and Mrs Kuna and was then delivered by Mr Paritsi to Mr Schachter on 13 January 2013.

13. Schachter gave evidence in his principal and reply witness statements (which evidence was not controverted by Mr Paritsi who was not called to give evidence notwithstanding that he was present during the hearing) to the effect that shortly after 13 January 2013 he discussed with Mr Paritsi the omission by the Kunas' to sign on the dotted line in Attachment 1 to the Method 2 document. Mr Schachter said he raised this matter with Mr Paritsi in a telephone conversation and that Mr Paritsi said that the Kunas' had signed on the line of their copy and that he would send Mr Schachter a copy. Mr Paritsi never delivered a copy of that document. Subsequent discovery in the VCAT proceeding disclosed that the Kunas' had not signed on the line of Attachment 1.

14. Imerva commenced building work on 3 February, and between that date and 8 October 2013 Imerva forwarded progress claims 1 to 7, each of which the Kunas' paid.

15. On 27 March 2014 progress claims 8 to 10 were forwarded. The Kunas' refused to pay these progress claims. On 7 April 2014 the Kunas' served a notice to remedy a number of defects identified by a building expert, Mr Lorich. Under the notice Imerva was given 10 days to remedy the defects.

16. On 11 April 2014 Imerva served a notice upon the Kunas' to remedy the alleged breach for non-payment of progress claims 8 to 10.

17. On 24 April 2014 the Kunas' purported to terminate the contract based upon the alleged defects.

18. On 29 April 2014 Imerva purported to terminate the contract based upon the non-payment of progress claims 8 to 10. On 6 May 2014 Imerva commenced VCAT proceedings claiming $529,820.62, representing the debt due from progress claims 8 to 10 as well as variations and delays, interest, a 10% builder's margin on the unpaid progress claims and variations, and GST.

Decision on compliance with Regulation 12(a) – Form 1

19. Tate JA, with whom the other members of the Court agreed (Kyrou and McLeish JJA), said [1] that the key question in the proceeding was whether the placing of the initials at the foot of the right hand side of the page containing the warning, was sufficient compliance with Regulation 12(a) to displace the statutory schedule for progress payments fixed by s.40(2) of the *Domestic Building Contracts Act*.

20. The issue was not whether it was necessary to use a full signature as opposed to initialing the page, indeed it was not argued on behalf of the Kunas' that a signature was required.

21. The crucial issue was where the signature was to be placed on the Regulation 12(a) Form 1 warning document.

22. The Court referred [72] to Ormiston J's decision in *Campbell v. DPP* [1995] 2 VR 654, where he emphasized that the word "signature" and the concept of affixing a signature and signing must be interpreted according to the language and context of the particular provision under consideration, because in each case, and particularly when considering those expressions in statutes, it must depend entirely on what is meant by the expression used in that statute.

23. The Court agreed [79] with the Kunas' submission that Regulation 12(a) was not satisfied by a party's agreement to use an alternative arrangement, nor by a party's acknowledgement that it had agreed to use an alternative arrangement. Rather, it requires a party's acknowledgement that it has read the warning – that is, the party must acknowledge it has read that its legal rights have changed.

24. The character of Form 1 containing a warning was significant [81]. Regulation 12(a) makes clear that "*the prescribed manner by which agreement to an alternative arrangement is to occur includes signing the warning. Regulation 12(a) presupposes that there will be ascent to the adoption of an alternative arrangement; what it requires is that the 'warning … is signed by the building owner'. It is the warning, and not simply the form, which must be signed*".

25. Further the Court said [83] that:-
"*What is important is that the signature is placed in such a position on Form 1 that it can be confidently inferred that the building owners have read the warning of the effect on their legal rights of their acceptance of an alternative progress payments regime. In my view, the presence of the Kunas' initials at the foot of Attachment 1 does not permit that inference to be drawn. Not only have the initials been placed in a manner far removed from the designated position, but the presence of the initials on the right hand side of the foot of Attachment 1, in a manner that is undifferentiated from the marking of each page of the contract, indicates that the placing of the initials at the foot of Attachment 1 does no more than record an acknowledgment that the*

Contract includes Attachment 1, just as the contract includes each of the other pages marked by initials".

Decision on equitable estoppel

26. Imerva argued that even if there had not been compliance with s.40(4), the Kunas' were estopped from relying on the regime of progress payments prescribed under s.40(2) of the Act because Paritsi had represented that the warning in Attachment 1 had been signed and Imerva had relied on this representation to its detriment. Imerva relied upon the principles of promissory estoppel expressed by the High Court in *Waltons Stores (Interstate) Limited v. Maher* and *The Commonwealth v. Verwayen*.

27. Imerva relied upon the High Court decision in *Nelson v. Nelson* (1995) 184 CLR 538, (Deane and Gummow JJ at 570, Dawson J at 573, and McHugh J at 616), where the court rejected the adoption of any inflexible rule that illegality arising from the contravention of a statute will always preclude a grant of equitable relief.

28. The Court of Appeal, whilst recognizing the general principle expressed in *Nelson v. Nelson*, said that the High Court in that case also recognized that courts should not enforce legal or equitable rights where the legislative intention is plain that such rights are unenforceable [101]-[106].

29. The Court upheld the decision of the primary Judge stating that the statutory language indicated an intention that there was no scope for estoppel in the context of a breach of s.40(2). The Court said that although the prohibition can be avoided, this is only so where there has been compliance with s.40(4) and Regulation 12(a) [108].

GUASTALEGNAME v. AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED
[2017] VSC 420.

HOME BUILDING INSURANCE POLICY – HOME DAMAGED BY STORM CAUSING FLOODING AND POOLING OF WATER UNDER AND SURROUNDING THE CONCRETE SLAB – RESULTANT HEAVE OF THE CLAY SOIL BENEATH THE FOUNDATION SLAB AND DAMAGE TO THE HOME BY CRACKING OF WALLS, ROOF FRAMES AND OTHER CONSEQUENTIAL DAMAGE – A GENERAL EXCLUSION IN RESPECT OF DAMAGE CAUSED BY "SOIL MOVEMENT OR SETTLEMENT"- HELD THAT THE HEAVE FELL WITHIN THE "SOIL MOVEMENT" EXCLUSION

1. The plaintiff as owner of a home in Keilor obtained insurance from AAMI in the form of a "Home Building Insurance" policy.

2. Under the terms of the policy AAMI agreed to indemnify the plaintiff in respect of loss, damage or destruction to the building caused by a number of insured events, including storm.

3. On 25 December 2011 a storm caused hailstones and rain to inundate the plaintiff's land and the building. The inundation included water coursing around the building and pooling under and about the concrete slab of the home. This led to heave of the clay soil beneath the foundation slab causing the soil to expand and raising the slab causing damage to walls, roof frames and other consequential damage to the building.

4. The plaintiff claimed indemnity under the policy with respect to the damage. AAMI admitted the storm caused the inundation, the consequent heave in the soil, and that such heave was the cause of the plaintiff's loss and damage. However it denied liability on the basis of a general exclusion of liability to indemnify the plaintiff in respect of loss or damage to the building caused by "*soil movement*".

5. Relevantly, the general exclusion relating to the movement of soil provided:-
"***What we do not cover – general exclusions ...***
You are not covered under any section of the policy for damage, loss, cost or liability caused by or arising from or involving:
...
erosion or washing away of soil, earth or gravel, the washing away or movement of the surface of any path or driveway which has a surface consisting of a loose material such as gravel, stone or dirt,
soil movement or settlement,
subsidence or landslide ***unless*** *caused by the insured event of earthquake,*
.... ".

6. Based upon expert evidence the parties agreed the meanings of the following words:-

(a) Heave - is the upward movement of the earth supporting a building because of the expansion of clay soil. In this case, the relevant earth was supporting the concrete slab of the building;

(b) Subsidence - is the downward movement of the earth supporting a building because of an inherent instability of that earth that is unconnected to the weight of the building. It is the opposite of heave. It is also to be distinguished from settlement, where the weight of the building is the cause of the movement.

7. Neither party contended that there was any distinction to be drawn between the meaning of the terms "*movement of the earth*" (as used in the definition of heave and subsidence), and "*soil movement*" (as used in the general exclusion in the policy relating to the movement of soil).

8. Hargrave J referred to the Macquarie Dictionary definition of "e*arth*" as:-
"*6. The softer part of the land, as distinguished from the rock; soil*".

9. The only question for determination by the Court was whether the soil movement exclusion applied. In short, the question was whether "*heave*" fell within the natural and ordinary meaning of "*soil movement*" in the exclusion clause?

10. The plaintiff submitted that heave did not fall within the meaning of soil movement on the basis that "*soil movement*" was limited to the movement of a mass of soil to a different location.

11. The plaintiff argued that the wording in the exclusion clause "*soil movement or settlement*" meant that the words "*soil movement*" ought to be construed as limited by the specific words which follow it ("*or settlement*"), because there is otherwise no reason to have included those latter words. Accordingly the literal meaning of "*soil movement*" could not have been intended because the term "*or settlement*" would be superfluous.

12. The plaintiff argued that the soil movement exclusion was ambiguous and therefore ought be construed contra preferentum.

13. In support of the submission that the term soil movement was limited to movement of a mass of soil to a different location the plaintiff also submitted as follows:-
"*For example, one would not refer to the ingredients of a cake as having "moved" where they expand under baking. One would not refer to cold water as having "moved" where it freezes and expands in an ice tray. Nor would one refer to a balloon as having "moved" where it had been blown up*".

14. The Court rejected the plaintiff's submission and held that the plaintiff's claim for indemnity in respect of loss and damage to the building caused by heave fell within the "*soil movement*" exclusion under the policy.

15. Hargrave J's reasons were as follows:-

(a) first, the plaintiff's contention that heave was the opposite of settlement, was incorrect. Heave (upward movement) was the opposite of subsidence (downward movement), not of settlement. Both heave and subsidence involve inherent instability of the soil, whereas settlement results from the weight of the building on which the building rests (viz. not related to any inherent instability of the soil). Accordingly, at its highest the plaintiff's argument could only be that the soil movement exclusion was limited to a class of soil movement which was not caused by the weight of the building. This was of no assistance to the plaintiff because heave is a form of soil movement and is therefore included within the soil movement exclusion [20];

(b) second, the conjunction "*or*" is used in different senses in the exclusion clause. It is not necessarily used to differentiate between a preceding word or words and the following word or words [21];

(c) third, earthquake, "*including subsidence and landslide caused by an earthquake*", is an insured event, and is only necessary if it was intended to exclude those kinds of soil movement if not caused by earthquake. Further, it was only necessary to list the subsidence or landslide exclusions seperately because it was subject to the earthquake exception. Absent the earthquake exception, the soil movement exclusion would likely have read "*Soil movement or settlement, subsidence or landslide …*". In that event the use of the first "*or*" in this formulation would be a conjunction to join the general class (soil movement) with examples of the kinds of the matters falling within that class [22];

(d) fourth, the plaintiff's change of location construction was not reasonably open in any event. In addition to excluding the general class of "*soil movement*", the general exclusions expressly exclude erosion, subsidence, landslide and settlement, all of which are kinds of soil movement. Given the varying kinds of soil movement which are expressly included it would not be reasonable to attribute to the parties an intention that the "*soil movement*" exclusion was limited only to the movement of a mass of soil to a different location [23];

(e) fifth, Hargrave J rejected the often made contention that specific words would be mere surplusage if general words are given their literal or even natural and ordinary meaning. He said that reading the policy as a whole, there was no reasonable ground for concluding that the parties intended the "*soil movement*" exclusion to have the limited meaning put forward by the plaintiff. He concluded that the exclusion was intended to exclude indemnity for building damage caused by soil movement of whatever kind [24]-[25].

CSR LIMITED v. ADECCO (AUSTRALIA) PTY LTD

[2017] NSWCA 121.

IMPLIED AGREEMENT - LABOUR HIRE AGREEMENT FOR A FIXED TERM - PARTIES CONTINUED AFTER THE EXPIRATION OF THE AGREEMENT AS IF GOVERNED BY ITS TERMS – HELD THAT THE RELATIONSHIP BETWEEN THE PARTIES CONTINUED ON THE SAME TERMS UNDER AN IMPLIED AGREEMENT

1. In this case the Court considered whether the terms of a detailed written agreement for a fixed term continued, after that term had expired, to govern the parties to it where they continued dealing with each other.

2. The case concerned a labour hire agreement under which contract labour was supplied to CSR Limited (CSR) by Adecco (Australia) Pty Ltd (Adecco) for the purpose of utilising such labour for truck driving and other purposes for CSR's "Readymix concrete" business.

3. This case may be relevant in construction cases involving labour or plant hire agreements on large projects. Such contracts may well contain express terms covering the situation where the contract hire continues beyond a fixed term. However where no such express term exists, the principles discussed in this case will be highly relevant.

4. Under clause 23.2 of Part B of the agreement, Adecco agreed to indemnify CSR in respect of any claim by Adecco's staff for personal injury and/or property damage arising out of or in connection with the performance of any duties carried out for CSR under the agreement.

5. The contract was for a period of 2 years commencing on 1 April 2000. CSR had the option to extend the term for a maximum of 2 years.

6. When the agreement expired on 30 March 2002 the parties agreed to extend it, initially until 30 June 2002, and then until 31 July 2002. There was no evidence of the communications between CSR and Adecco which led to the extensions other than an internal Adecco email of 27 August 2002 that stated that the contract was "*renewed verbally until end July*".

7. Between June 2002 and May 2004 the parties attempted unsuccessfully to negotiate the terms of a new agreement. The Trial Judge said that it was not determinative one way or the other that the parties were endeavouring to negotiate a new agreement which was different to the original agreement.

8. A Mr Frewin commenced working for Adecco in about 2001. He was provided as contract labour under the agreement with CSR, and commenced work as a truck driver for CSR's "*Readymix*" concrete business.

9. The truck he drove lacked suspension and caused Mr Frewin to suffer pain in his lower back. He had complained to CSR, but was directed to continue driving the vehicle. He continued working for Adecco as part of the labour supplied to CSR until December 2004 at which time he was dismissed. He subsequently experienced back pain and underwent surgery.

10. Mr Frewin issued legal proceedings against three defendants, including Adecco and CSR.

11. The claim was settled *inter alia* on the basis of there being judgment against CSR for a total of $960,000.

12. The only matter that remained to be determined by the primary judge was CSR's cross-claim seeking indemnity from Adecco under clause 23.2 of the agreement.

13. The Trial Judge rejected CSR's claim for indemnity, holding that the indemnities in clause 23 of the agreement were not part of the continuing legal relationship between the parties that proceeded at the expiration of the agreement on 31 July 2002.

14. The Court of Appeal upheld CSR's appeal on this issue. McColl JA, with whom Macfarlan and Simpson JJA agreed, held that it was to be inferred from CSR's and Adecco's conduct that the agreement continued in existence beyond its agreed expiry date (31.07.2002) on the same terms and conditions until at least March 2003, save that the agreement was terminable on reasonable notice.

15. The basis upon which the Court so found was implied contract. McColl JA commenced by referring to the following excerpt from *Chitty on Contracts*[1]:-

"**Express and implied contracts.** Contracts may either be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested … *There may also be an implied contract where the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term or the court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others*".

1 HG Beale, Gee on Contracts (32nd edition, 2015 Sweet & Maxwell), Volume 1, "General Principles" at 1-104.

16. The critical requirement for McColl JA was the conduct required in order to imply such contract, namely that the parties proceeded as though still governed by the terms of the original agreement. Her Honour set out the following excerpt[2] from the Victorian Court of Appeal decision in *Brambles Limited v. Wail; Brambles Limited v. Andar Transport Pty Ltd* [3] where the Court said:-

"*... The question whether an implied or tacit agreement to continue dealing on the same terms save that the agreement should be terminable on reasonable notice is to be inferred is, as Desmond CJ stated and as the other cases and treatises make abundantly clear, an evidentiary or factual question.* On the facts we have set out earlier we consider such an inference should be drawn here. The evidence, fairly sparse though it is, warrants the finding that after 3 April 1993 the parties proceeded as though still governed by the terms of the original agreement (save that, since it had already expired, either could terminate the substitute arrangement on reasonable notice), rather than a finding that they impliedly agreed merely that Andar should collect and deliver the laundry and that Brambles should pay it a reasonable sum for that or a finding that the parties made a series of individual implied agreements, six days a week, for that work to be done for a reasonable sum. In other words, after 3 April 1993 *the parties operated under a standing agreement under which all the procedures and, importantly, the remuneration were exactly the same as they had been under the written agreement.* The parties intended that that should be so. The contract thus made was not a mere variation of the original agreement, for it was not made until after the latter had expired ... whether the implied or tacit contract made after 3 April 1993, which cannot be an extension, is called a renewal is really a matter of definition. The important point is that it was a new and separate contract".

17. Her Honour also referred[4] to the *Brambles* decision with respect to its reference to the following propositions set out in the American case of *Steed v. Busby* where the Court in that case said:-

"When an agreement expires by its own terms, if without more the parties continue to perform as before, an implication arises that they have mutually assented to a new contract containing the same provisions as the old, and *the existence of a new contract is determined by an "objective" test, ie, whether a reasonable man would think, from the actions, that they intended to make a new binding agreement ...* In such a case, when the parties continue to do business together, their conduct may permit, or even constrain, a finding that they impliedly agree that their rights and obligations should continue to be measured as provided in the old contract".

18. McColl JA was at pains to make clear what proposition of law the *Brambles* decision stood for:-

"*Brambles* is not authority for the proposition that the terms of a detailed written agreement for a fixed term continue to govern the parties where they continue dealing with each other after the

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2 [2017] NSWCA 121, [100].

3 [2002] 5 VR 169, 188, [61].

4 [2017] NSWCA 121, [106].

fixed term has expired. Rather, it is authority for the proposition that it is open to a court to draw the relevant inference"[5].

19. She also emphasized the objective nature of the task in determining whether an agreement should be implied:-

"As is apparent from the authorities to which I have referred, and as both parties accepted, the question whether an implied contract following upon the expiry of an express fixed term contract may be inferred turns on an objective enquiry. … Adapting the language of McHugh JA in *Empirnall*, [138] the ultimate issue is whether a reasonable bystander would regard the conduct of the parties, *including their silence,* as signalling to the other party that their relationship continue on the terms of the expired contract. What was "required [was]" conduct by the parties as if the contract remained on foot"[6].

20. McColl JA relied upon a number of matters in holding that CSR and Adecco continued dealing with each other after the expiration of the agreement on the same terms. In the nine months following the expiry of the agreement Adecco supplied contract labour to CSR at a cost of $13.285m. Also, CSR continued to pay Adecco according to the same terms and conditions as in the agreement, until October 2002. Her Honour was satisfied based on the evidence that the parties' conduct was consistent with them acting as though the agreement still bound them.

21. Her Honour addressed two additional matters. First, whether in order to establish the implied contract following the expiration of the term of the written contract, it is necessary to establish that the parties so acted for the same period as the fixed term of the initial agreement. Her Honour's view expressed as *obiter* was that this was not necessary, it being sufficient to call evidence that the parties acted for "*a substantial period in order to found the inference*"[7].

22. The second matter was the issue of termination of such an implied agreement. McColl JA said[8] that the agreement between CSR and Adecco continued in existence on the same terms and conditions beyond its expiry date, save that the agreement was terminable upon reasonable notice. Her Honour did not discuss why the agreement ought be terminable upon reasonable notice, save that she appeared to accept that this was the principle expressed in the authorities referred to in the judgment[9]. Her Honour referred to Brooking J's decision in *Cawsand Pty Ltd v. Normans Wines Pty Ltd*[10], where his Honour held that although the fixed term agreement expired, a further agreement came into existence upon the same terms save that he was not prepared to

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5 Ibid at [111].

6 Ibid at [120].

7 Ibid at [137].

8 Ibid at [5(1)].

9 Ibid at [100].

10 Supreme Court of Victoria, Brooking J, 21 June 1989, unreported, BC8900640.

infer that the termination clause under the initial agreement continued, and that the agreement was terminable by either party by the giving of reasonable notice.

ABERGELDIE CONTRACTORS PTY LTD v. FAIRFIELD CITY COUNCIL

[2017] NSWCA 113.

MEANING OF PRACTICAL COMPLETION IN AMENDED AS4950-2006 FORM OF CONTRACT – A QUESTION OF CONTRACTUAL CONSTRUCTION – THE DATE OF PRACTICAL COMPLETION WAS THE DATE OF THE CERTIFICATE OF PRACTICAL COMPLETION (25.11.2016) – NOT THE ACTUAL DATE UPON WHICH THE CONTRACTOR REACHED PRACTICAL COMPLETION OF THE WORKS (16.09.2016).

1. This case concerned the issue of when practical completion occurred. The parties entered into an amended version of AS4960-2006 form of contract.

2. The contract was for major road works to be undertaken by Abergeldie for the Fairfield Council.

3. The contract provided that the contractor was to make progress claims in accordance with the *Building & Construction Industry Security of Payment Act* 1999 (NSW). The parties accepted that the existence of a valid "*reference date*" as defined in s.8(2) of the Act was a pre-condition to the service of a valid payment claim.

4. The contract provided that after "*practical completion*" of the works, there were only two reference dates. The first was the 28th day of the month "*immediately after practical completion (as determined by sub-clause 37.1)*" and the second was "*within 28 days after the expiry of the last defects liability period*" (per clause 37.4).

5. On 16 September 2016 the contractor wrote to the Council indicating that the contractor's view was that practical completion had been achieved on that date. The letter requested the superintendent issue a certificate of practical completion.

6. On 25 November 2016 the superintendent issued a certificate of practical completion certifying that practical completion for the relevant work had been achieved on 16 September.

7. On the same day, 25 November 2016, the contractor sent a payment claim to the superintendent seeking an amount of approximately $2.3m plus GST. On 7 December 2016 the Council issued a payment schedule indicating that no amount would be paid, there being no reference date permitting a payment claim to be made in November 2016. The basis for its position was its contention that practical completion occurred on 16 September and that therefore the reference date, being the 28th day of the month immediately after practical completion, was 28 September.

8. The contractor argued that practical completion did not occur until it was issued with a certificate of practical completion by the superintendent on 25 November, and that accordingly the reference date was the 28th day of the month in which the certificate was issued, namely 28 November 2016.

9. The adjudicator made a determination in favour of the contractor. The Council was successful before Ball J in its application to quash the determination on the ground that there was no valid reference date in respect of the payment claim made by the contractor.

10. The New South Wales Court of Appeal upheld the contractor's appeal, holding that the date of practical completion was the date of the superintendent's certificate of 25 November 2016, and that accordingly the reference date for the payment claim was 28 November 2016.

11. The case before the Court was determined as a matter of contractual construction. The statutory scheme for progress payments under the Act was however an important part of the context surrounding the contract, which the Court took into account in construing the contract [47].

12. It was not necessary for the Court to determine whether the adjudicator's application was open to review by the Court, because of the High Court's decision in *Southern Han Breakfast Point Pty Ltd (in liq.) v. Lewence Construction Pty Ltd* [2016] HCA 52; 91 ALJR 233, where it was held that the existence of a reference date is a pre-condition to the service of a valid payment claim.

13. The case does not establish any common law principles as to what constitutes practical completion. Rather, the decision turns upon the construction of the contract before the Court.

14. The Court of Appeal (Beazley ACJ, Basten and Meagher JJA) held that the date of practical completion was 25 November 2016, being the date of the Certificate of Practical Completion issued by the superintendent, certifying that practical completion had occurred on 16 September 2016. And accordingly the builder's payment claim of 25 November 2016 was a valid payment claim.

15. Basten JA, with whom the other members of the Court agreed, said [34] that there were a number of features of clause 34.6 of the contract which indicated that it was the date of the certificate of practical completion by the superintendent which provided the date on which practical completion occurred.

16. Clause 34.6 was in the following terms:-

"**34.6 Practical completion**

> The *Contractor* shall give the *Superintendent* at least 14 days written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.
>
> When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* shall in writing request the *Superintendent* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Superintendent* shall give the *Contractor* and the *Principal* either a *certificate of practical completion* evidencing the *date of practical completion* or written reasons for not doing so.
>
> If the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion* even though no request has been made".

17. Basten JA identified the following features of clause 34.6, as well as other matters under the contract, which led him to the said conclusion:-

    (a) the use of the present perfect tense with respect to an event which "*has been*" completed, indicates that the event has occurred, but connotes that the actual time of completion is unimportant [34]. That understanding fits the structure of the provision [35];

    (b) the certificate of practical completion to be issued by the superintendent (second paragraph of clause 34.6) is not said to **state** the date of practical completion but rather is said to **evidence** that date. Basten JA said this was "*consistent with the fact of practical completion occurring on the date of the certificate*". Basten JA said that that language was reflected in the definition of "*date of practical completion*" (clause 1 of the contract), the primary meaning of which was "*the date evidenced in a certificate of practical completion as the date upon which practical completion was reached*" [36];

    (c) under the contract there were two possible options as to the determination of the date of practical completion [37]-[40]. Either the Court itself was obliged to consider all the underlying facts to determine whether the works had reached practical completion. Alternatively the Court was to ask whether the superintendent had formed an opinion as to the underlying facts, and if so when that opinion was formed. Basten JA had little difficulty in considering that the structure and language of the contract was entirely consistent with the proposition that the conclusive event was the issuing of a certificate of practical completion based upon a contemporaneous opinion of the superintendent [40];

    (d) there were various other provisions in the contract which depended upon the date of practical completion [42]-[45]. It was the trigger for various consequences under the contract. For example, clause 14 imposed responsibility on the contractor for the care of the whole of the work under the contract up to 4.00pm on the day of practical completion [42]. Also, under clause 27 the contractor was obliged to remove temporary works and construction plant within 14 days after the date of practical completion;

(e) finally, there was the legislative scheme for progress payments under the Act which formed part of the context which had to be considered in construing the contract [47]. Accepting that a valid payment claim depended upon the existence of a reference date, it would be absurd if a dispute as to the existence of a reference date turned on the determination of a judge following a trial as to the date the judge considered practical had been achieved. Such conclusion "*would drive a horse and cart (or perhaps a B-double) through the legislative scheme*" [47].

HUI v. ESPOSITO HOLDINGS PTY LTD

[2017] FCA 648.

INTERNATIONAL COMMERCIAL ARBITRATION – APPLICATION TO SET ASIDE TWO PART AWARDS – APPLICATION TO REMOVE ARBITRATOR – ARTICLES 12, 18, 34(2)(a)(ii) and (iv) AND 34(2)(b)(ii) of the UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION – RELEVANT PARTS OF THE AWARDS WERE SET ASIDE AND THE BALANCE OF THE CLAIMS WERE TO BE DEALT WITH BY A NEW ARBITRAL TRIBUNAL

1. In this case Beach J. in the Federal Court heard an application by Hui, UDP and 5 Star Foods Pty Ltd (the Applicants) to set aside two partial awards of an arbitrator, and to have the arbitrator removed. The application was made pursuant to Articles 12, 18 and 34 of the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law), which is incorporated into domestic law by s16 of the *International Arbitration Act* 1974.

2. The application arose in relation to an arbitration commenced by Esposito Holdings Pty Ltd (Esposito) in which it claimed the unpaid balance of monies it said were due and payable to it under a share sale agreement executed on 11 December 2013, and subsequently amended.

3. Under the share sale agreement Esposito sold to UDP all of the issued shares in 5 Star Foods Pty Ltd (5 Star). Hui guaranteed the performance of UDP's obligations thereunder.

4. Completion of the share sale agreement took place on 31 January 2014, but only part of the purchase price was paid on completion. The balance was to be paid over the following year and was to consist of two payments of deferred consideration of $1m each, an earn out payment of up to $7m, a working capital adjustment, and a refund of any tax paid on account of the Commissioner of Taxation, that was attributable to the period pre-completion.

5. The timeline of relevant events was as follows:-
   - 30.10.2014 - Esposito served on UDP, Hui and 5 Star, a notice of arbitration and a statement of claim;
   - 10.11.2014 - Rodney Slattery of PPB Advisory and Gregory Quinn of PPB Advisory, were appointed as Receivers & Managers of 5 Star;
   - 10.11.2014 - Shortly after 10 November, Marcus Derwin, the sole director of all the companies within the UDP Group commenced a marketing and sale process in relation to the UDP Group. Further, an investigation was initiated by PPB's Advisory corporate finance team as to what had been represented by Esposito to UDP during the sale process of its shares in 5 Star;
   - 18.12.2014 - The arbitrator conducted a directions hearing, the main purpose of which was to consider Esposito's application to make early discovery of documents. Esposito's counsel also foreshadowed that Esposito

might be amenable to having a preliminary assessment and provision of partial awards on some issues concerning its claims, once defences had been filed;

- 24.12.2014 - The arbitrator directed discovery be provided by the Applicants and that they file statements of defence. Neither UDP or 5 Star filed their defences within the time directed;
- 19.03.2015 - The arbitrator conducted a directions hearing to consider an application by Esposito that there be a preliminary hearing and a partial award of certain of the claims made by it in respect of the share sale agreement, including the first and second deferred consideration payments of $1m each, the refunds of income tax claim in the amount of $1,496,111, and the earn out cap of $7m also said to be due (these were referred to as the "paragraph 1(a) claims").

  Esposito's counsel submitted that the arbitrator should determine the paragraph 1(a) claims without the benefit of any defences by UPD or 5 Star. He submitted that the partial award should be binding. He also submitted that the arbitrator should set a timetable and leave open the opportunity for UDP and 5 Star to expand the scope of the preliminary hearing to include their cross-claims.

  UDP and 5 Star's counsel said that his clients were not in a position to file a defence or cross-claim as at the date of the preliminary conference. He submitted that the preliminary hearing could hear argument about the availability of defences and set offs, but that such a preliminary determination would not be in the form of an award that would be enforceable.

  The arbitrator directed that there would be a preliminary hearing in respect of the paragraph 1(a) claims;
- 02.04.2015 - UDP and 5 Star served their statement of defence;
- 10.04.2015 - Hui served his statement of defence and counterclaim;
- 22.04.2015 - Messrs Slattery and Quinn were appointed Receivers of UDP and 5 Star. On the same day Messrs Marsden, Stone and Beck of RSM Bird Cameron were appointed Administrators of UDP and 5 Star;
- 14.05.2015 - PPB Advisory issued a draft report into alleged breaches of warranties by Esposito. Based upon this report the Receivers decided to instruct Ashurst Lawyers to participate in the arbitration and bring a cross-claim against Esposito in respect of breaches of warranty identified in the report;
- 21.05.2015 - The arbitrator held a further directions hearing in which he said that the proposed preliminary hearing would only concern the paragraph 1(a) claims and would not concern the defences to those claims. He stated he was dealing "… simply [with] the claims. I understand you are putting them to proof and you have flagged these other defences.

We are not dealing with the other defences";

- 03-04.06.2015 - The preliminary hearing was held. Only Esposito and Hui appeared. There was no appearance on behalf of UDP or 5 Star. The Administrators of UDP and 5 Star had informed the arbitrator that they did not intend to participate because of the limited scope foreshadowed in the directions hearings and directions preceding the preliminary hearing, namely that the preliminary hearing would not concern the availability of set off defences or their merits;
- 01.07.2015 - UDP and 5 Star sought to file an amended statement of defence and counterclaim which pleaded set off defences that were based on breach of warranty claims against Esposito;
- 14.07.2015 - Hui filed a further amended statement of defence and counterclaim which pleaded set off defences;
- 25.09.2015 - The arbitrator's reasons in respect of the preliminary hearing were delivered. The arbitrator determined the paragraph 1(a) claims, but also determined issues concerning the availability of set off defences and Hui's guarantee. Most if not all of such issues were not within the ambit of the preliminary hearing. Indeed, little, if any submissions were made thereon even by Esposito and of course, UDP and 5 Star did not attend the preliminary hearing because of its limited nature.
  The arbitrator found that UDP and Hui as guarantor were both liable to Esposito for the paragraph 1(a) amounts without right of set off;
- 26.11.2015 - Hui filed an outline of submissions challenging the arbitrator's 25 September 2015 reasons. Hui contended that the arbitrator had exceeded his jurisdiction and had denied Hui procedural fairness by entering into and deciding issues as to the availability of the set off and Hui's guarantee;
- 18.12.2015 - The arbitrator forwarded an email noting that he was yet to make an award and was open to hearing argument as to whether his reasons were "substantively wrong";
- 22.12.2015 - The arbitrator made directions fixing a hearing for 16 March 2016 in respect of Hui's application of 26 November 2015;
- 18.01.2016 - UDP and 5 Star filed an outline of submissions which supported Hui's challenge to the arbitrator's reasons. They also supported Hui's application for the arbitrator to withdraw from office;
- 16.03.2016 - The arbitrator held a hearing of the application by Hui, UDP and 5 Star;
- 15.04.2016 - The arbitrator delivered a second set of reasons. He rejected the contentions, holding that he was at liberty to decide not only whether Esposito had made out the paragraph 1(a) claims but also whether there should be a partial award in favour of Esposito for the payment of any specified amount. He took the view that as reasonable litigants

Hui, UDP and 5 Star should have foreseen the possibility of the arbitral tribunal determining the set off issues. However with respect to his determination that Hui was liable under the guarantee, the arbitrator accepted that Hui had not been given the opportunity to adduce evidence going to the unenforceability of the guarantee. Beach J noted (at para [91]) that in his view the pre-judgment of the guarantee issue alone, notwithstanding the attempts to remedy what had occurred, "*provides reason enough as to why he should not continue as arbitrator*";

- 13.05.2016 - Hui filed a submission contending that the arbitrator should nevertheless withdraw from office given that the arbitrator had decided in his 15 April 2016 reasons that he had erred in deciding adversely to Hui on the guarantee question without affording him an opportunity to be heard. Hui submitted that a reasonable person would no longer have confidence that the arbitrator could come to a fair and balanced conclusion on the issues if he were to reconsider them;
- 12.09.2016 - The arbitrator delivered a third set of reasons addressing the form of partial award and the application that he withdraw from office. The arbitrator stood by the grounds expressed in his 15 April reasons in relation to his determination of the set off issues. Further the arbitrator stated that he was not persuaded that he should withdraw from office.

  12.09.2016 - First partial award – under the first partial award the arbitrator found that subject to certain limited defences, Hui, UDP and 5 Star were liable to Esposito for the paragraph 1(a) claims. The limited defences reserved under the award included the entitlement to set off such amount as may be found due by Esposito to UDP for the working capital adjustment amount or damages for the warranty claims under clause 16 of the share sale agreement. He also reserved the right of Hui to have determined at a further hearing the matters referred to in paragraphs 84 to 86 of Hui's further amended statement of defence. Subject to the rights of the respondents to pursue the above matters the arbitrator declared that the Refund Amounts in the sum of $3,663,847 became due and payable by Hui, UDP and 5 Star.
- 15.09.2016 - The second partial award – the arbitrator made a further partial award dismissing a further application by Hui that the arbitrator withdraw.

The Federal Court proceedings

6. Hui, UDP and 5 Star issued proceedings seeking to set aside parts of both the first and second partial awards and an order for the removal of the arbitrator.

7. The primary provisions of the *International Arbitration Act* 1974, which were relevant to the applications were S18A(ii), s18C and Articles 12(2), 18 and 34(2)(a)(ii) and 34(b)(ii) of the UNCITRAL Model Law (as incorporated as Schedule 2 to the Act).

8. Article 12(2) provides:-

"*Article 12. Grounds for challenge*

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made".

9. Section 18A(2) provides:-

"*(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration*".

10. Article 18 provides:-

"*Article 18. Equal treatment of parties.*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

11. Section 18C provides:-

"*For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case*".

12. Article 34(2)(a)(ii) and (b)(ii) provides:-

"*Article 34. Application for setting aside as exclusive recourse against arbitral award*

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

...

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(b) the court finds that:

(ii) the award is in conflict with the public policy of this State".

13. Justice Beach repeated some general observations regarding Article 34, that he had made in the earlier case of *Sino Dragon Trading Limited v. Noble Resources International Pte Limited* [2016] FCA 1131 at [70] to [74] and [175] to [178]. These observations included the following (at paragraphs [115]-[122]):-

(a) that Article 34 significantly limits the circumstances under which an award may be set aside;

(b) such a limitation is reinforced by other provisions including Article 5 and Sections 2D, 39 2D(a) to (c) and (e), 39(2)(b)(i) and (ii);

(c) a challenge under Article 34 is not an occasion for a merits review or for delving into evidence before the arbitral tribunal to assess legal or factual error;

(d) the context and practical circumstances and consequences of the prejudice or unfairness will not succeed if it falls short of "*real unfairness*" or "*real practical injustice*" (per *TCL Airconditioner (Zhongshan) Company Limited v. Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55] per Allsop CJ, Middleton and Foster JJ);

(e) Article 34(2)(a)(ii) and Article 34(2)(b)(ii) overlap. Beach J referred to the decision of Croft J in *Amasya Enterprises Pty Ltd v. Asta Developments (Aust) Pty Ltd* [2016] VSC 326 at [26] where his Honour said:-

"*The 'unable to present its case' and 'public policy' grounds were argued together and as alternatives to one other in these proceedings. In my view, and for the reasons that follow, there is no practical difference between these two grounds in the way in which they relate to natural justice and procedural fairness in the circumstances of the case. Nevertheless it is important to note that these grounds are conceptually different. The 'public policy' ground is directed towards contraventions of 'fundamental principles of justice and morality' of Victoria. By contrast, the 'unable to present its case' ground focuses on whether the party seeking to set aside the award has been accorded procedural fairness. As the following reasons show, this point may be a distinction without a difference in the present context because the requirement that parties in arbitrations be accorded procedural fairness or natural justice within the meaning of those terms in the relevant legislative context is part of the public policy of Victoria, and for that matter, Australia*".

14. Later in his judgment Beach J made some further observations in relation to Article 18C and Articles 34(2)(a)(ii) and (b)(ii). With respect to Article 18C he said (at paragraphs [223]-[228]):-

(a) "*reasonable opportunity*" corelates but may not be the same as the "*hearing rule*" under the administrative law concept of procedural fairness;

(b) in general the relevant enquiry is whether a party had an appropriate opportunity to deal with an issue;

(c) the opportunity to be afforded only needs to be reasonable and that is a question of degree and may be satisfied provided the issue is somehow raised, even if only briefly.

15. With respect to Articles 18, 34(2)(a)(ii) and (b)(ii) have overlapping themes, Beach J said at [229]:-

(a) a breach of Article 18 will usually establish the ground in Article 34(2)(a)(ii), although whether a remedy will go may depend upon how egregious the breach is;

(b) the public policy ground under Article 34(2)(b)(ii) must be construed narrowly such that any breach of the rules of natural justice must be egregious and fundamentally offend principles of justice and fairness. In other words the breach must be exceptional.

Beach J's decision

16. Beach J held [239] that Hui, UDP and 5 Star had made out the grounds for setting aside relevant parts of the two partial awards, under Articles 34(2)(a)(ii) and (4) and (b)(ii), in relation to the article 18 breach concerning the obligation to treat the parties with equality and give each party a full opportunity of presenting his case.

17. It was clear on the evidence that at no time were the applicants properly notified that there was any possibility of the defences of set off raised by them being determined as a result of the preliminary hearing [176].

18. With respect to Esposito's contention that the applicants had lost nothing of value in any event, on the basis that the set off arguments were otherwise hopeless, Beach J, whilst acknowledging the validity of such a contention in the event that the arguments were in fact hopeless, held that such arguments were reasonably arguable [179]-[199].

19. With respect to the application for the removal of the arbitrator based upon prejudgment, Beach J said [240]-[258]:-
    (a) Article 12 in conjunction with s18A confirms the established principle of arbitrator impartiality;
    (b) a real possibility of prejudgment can establish the "*real danger of bias*" test under s18A and Article 12;
    (c) that the better view of the authorities is that the perspective from which the real danger of bias is to be adjudged is that of the "*reasonable bystander*" or "*reasonable man*" (where, as in this case, actual bias was not alleged) [240]-[241];
    (d) the test for removal of an arbitrator on the basis of the no hearing rule and prejudgment was expressed by Mance J in *Lovell Partnerships (Northern) Limited v. AW Construction plc* [1996] 81 BLR 83 where his Honour said:-
    "*The legal test is whether a reasonable person would no longer have confidence in the present arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted*";
    (e) Lord Denning MR expressed the principles as follows in *Modern Engineering (Bristol) Limited v. C Miskin & Son Limited* [1981] 1 Lloyd's Report 135:-
    "*Are the circumstances such as to demonstrate that the arbitrator is not a fit and proper person to continue to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion.*
    The question is whether the way he conducted himself in the case was such that the parties can no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him" [244];

(f) the test is whether a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues if they were remitted to the same arbitrator [245];

(g) the arbitrator had conducted himself in a manner that the applicants could no longer have confidence in him because [247]:-

(i) the arbitrator stepped well outside the bounds of the preliminary hearing;

(ii) the arbitrator decided various substantive questions in a final manner without giving some of the parties an opportunity to be heard;

(iii) it was wholly unsatisfactory for the arbitrator to try and repair the substantial problem after his reasons of 25 September 2015. He had by then decided key questions that ought not to have been decided;

(iv) his second set of reasons published 15 April was a retrospective analysis and in some respects a questionable recounting of what had previously occurred.

20. Beach J held that the balance of the claims the subject of the arbitration be dealt with by a new arbitral tribunal [259].

MASTERS HOMES IMPROVEMENT AUSTRALIA PTY LTD v. NORTH EAST SOLUTIONS PTY LTD
[2017] VSCA 88.

LETTER OF OFFER AND AGREEMENT FOR LEASE – EXPRESS TERM OF THE AGREEMENT FOR LEASE TO ACT REASONABLY AND IN GOOD FAITH – TRIAL JUDGE HELD THAT THE TERM WAS BREACHED – APPEAL TO COURT OF APPEAL SUCCESSFUL – HELD THAT RESPONDENT DID NOT ESTABLISH ANY BREACH OF THE OBLIGATION TO ACT REASONABLY AND IN GOOD FAITH

1. Prior to 2009 Woolworths developed a strategy of expanding its business by opening a chain of hardware stores in competition to Bunnings stores. Its subsidiary Masters Home Improvements was to be the corporate vehicle through which Woolworths would undertake this business.

2. Woolworths' business plan was to expand it rapidly by identifying suitable sites and entering into agreements to build on those sites as quickly as possible. It was also part of the plan to construct stores that were more attractive-looking than Bunnings stores, and therefore Woolworths expected that the Masters stores would be more expensive to construct than a comparative Bunnings store. As a consequence Woolworths adopted the approach of entering into a contract with a builder or developer under which the latter would purchase the land, construct the store upon it and enter into a lease with the builder/developer for a substantial period with multiple options for renewal.

3. In terms of the cost of constructing the building, Woolworths would have the builder/developer undertake the cost of construction, save that Masters would contribute towards the cost of construction an amount equal to the difference between the cost of building a Bunnings store on the site and the greater cost of building a Masters store on the site.

4. Woolworths identified a site in Strathdale, near Bendigo, as a potential site.

5. It entered into negotiations with North East Solutions Pty Ltd, to develop the site by constructing a Masters store on it. On 2 June 2009 Woolworths and a Mr Blake (on behalf of Maxi Foods Group (which included North East as part of the group), executed a Letter of Offer by which Maxi agreed to purchase the site and to construct a Masters store on it, which was then to be leased by the Woolworths group for a term of 12 years with six 5 year options for renewal. The Letter of Offer also provided for an annual rent of $264,000 plus GST.

6. Under the terms of the Letter of Offer, clause 13 provided that a design brief would be issued containing Woolworths' current standard specification. If the cost of the design brief differed to the cost of constructing a comparative Bunnings store, Woolworths would contribute that cost by making a lump sum payment to the builder/developer. Rider Hunt, quantity surveyors, were to verify the cost difference.

7. On 4 August 2009 Woolworths' property committee approved entry into the Letter of Offer and approved a contribution to the development costs of the Masters store of up to $1.7m. That

figure was not communicated to North East or its director Mr Blake. During the trial it was referred to as "the undisclosed budget".

8. In late November 2009 Woolworths formed the view that the local Bendigo Council was not supportive of the development in that the Council considered that the development was too close to residential developments.

9. Nevertheless Woolworths proceeded with the development and by December 2009 a generic Master design brief (Design Kit Rev B2) was available.

10. Rider Hunt estimated the construction cost at $12,104,254 (or $899 per m²), which was $1,176,562 more than the cost of constructing a 14,072m² store built to the specification of a Bunnings May 2008 Brief Rev 2.

11. Design Rev Kit B was provided to Mr Blake in January 2010. He engaged Vaughan Constructions Pty Ltd (Vaughan) to provide a quote. Vaughan provided a quote of $12,348,061 ($1,130 per m²).

12. On 22 February 2010 North East and Woolworths and Masters entered into an Agreement for Lease for the Strathdale site. Under clause 3 North East was obliged to construct the store in accordance with plans and specifications referred to in the Agreement ("*the Landlord's Works*").

13. The key provision in the Agreement was clause 2:-

"***2.2 Costs Estimate***

(a) As soon as reasonably practicable after receipt by the landlord of the briefing kit the landlord, acting reasonably and in good faith, must:

(i) determine the Landlord's Works Costs and advise the Tenant in writing of the Landlord's Works Costs;

(ii) provide, on an open book basis, its costings of the Landlord's Work Costs; and

(iii) advise the Tenant whether it requires the Tenant to contribute towards the Landlord's Work Costs and the amount of that contribution (if any).

(b) The Landlord and the Tenant, acting reasonably and in good faith, must attempt to resolve any differences they may have in relation to:

(i) the Landlord's determination of the Landlord's Works Costs; and

(ii) the amount that the Tenant must contribute towards the Landlord's Work Costs (if any) and the manner in which this contribution will be made.

(c) If, by the later of:

(i) 20 April 2010; and

(ii) the date which is six weeks after the date of receipt by the Tenant of notice of the Landlord's Work Costs, or such later date to which the parties agree, the Landlord and the Tenant cannot agree on:

(iii) the Landlord's Works Costs; or

(iv) the amount that the Tenant must contribute towards the Landlord's Work Costs (if any) and the terms and conditions on which this contribution will be made, the Landlord or the Tenant may:

(v) terminate this agreement by giving notice in writing to the other; and

(vi) procure the withdrawal of the application for the Development Approval".

14. The principal issue in dispute was whether Woolworths and Masters breached the obligation in clause 2.2(b) of the Agreement for Lease, to act reasonably and in good faith in attempting to resolve any differences that they had with North East in relation to the Landlord's Work Costs, the contribution of Masters to those costs, and the manner in which that contribution was to be made.

15. Between 3 March and 22 April 2010 the parties held various meetings and negotiations in an attempt to agree North East's work costs for the project (ie. "*the Landlord's Work Costs*" under clause 2.2(b)(i)), and the amount which Woolworths would contribute towards the work costs amount.

16. On 3 March 2010 North East provided to Woolworths its formal estimate (per clause 2.2(a)) in the sum of $12,348,061 plus GST. It advised that the comparative costs of a Bunnings store was $8,375,640, and that accordingly Woolworths' contribution would be $3,972,421 plus GST (ie. the Tenant's contribution to the Landlord's Works Costs).

17. Mr Blake (North East) and Mr MacMillan (Woolworths) delegated the technical assessment and discussions to representatives of Vaughan's and to Mr McDonald of Rider Hunt.

18. As a result of these discussions Vaughan's revised its figures, and on 18 March 2010 it provided a spreadsheet to Mr McDonald (Rider Hunt) showing that Woolworth's contribution would be $3,454,674.74.

19. On 26 March 2010, following further discussion, solicitors for North East forwarded a letter to Woolworth's solicitors advising that the Landlord's Works Costs for the purposes of clause 2.2(a)(ii) was $12,348,061 plus GST, and that the Tenant's Contribution under clause 2.2(b) was $3,772,421 plus GST (ie. reduced from $3,972,421 plus GST as communicated on 3 March 2010).

20. On 29 March 2010 Rider Hunt forwarded to Mr McMillan (Woolworths) the spreadsheet which Vaughan's had sent to Rider Hunt on 18 March 2010. Rider Hunt made amendments to the spreadsheet. This was the spreadsheet in which, on 18 March 2010, Vaughan's had indicated the difference between constructing a Masters store and a Bunnings store was $3,247,194.55.

21. The amendments which were made to Vaughan's spreadsheet comprise site costs, fit out costs and authority costs, totaling $673,701.29, which Mr McDonald considered should be excluded from the base costs. When those amounts were deducted from Vaughan's figure of

$3,247,194.55, the balance was reduced to $2,573,493.26 as being the difference between the construction of a Masters store and a Bunnings store. In addition Mr McDonald identified questions about the propriety of a further $2,312,181, and accordingly the final amount of the difference between constructing a Woolworths store and a Bunnings store depended upon resolution of the items comprising the $2,312,181. Mr McDonald described the worksheet in his evidence as a "work in progress".

22. On 31 March 2010 Mr McDonald telephoned Mr Blake and told him that Vaughan's estimate was not acceptable to Woolworths. On 6 April 2010 solicitors for North East forwarded a letter to the solicitors for Woolworths noting that because certain costs were to be deleted from North East's current calculation of the Landlord's Works Costs, it had reduced the tenant's contribution from $3,247,194.55 to $2,941,169.

23. During the period 6 April and 22 April 2010 there were further communications between the parties directed to negotiating agreed figures as to the Landlord's Works Costs and the tenant's contribution, and the manner in which it was to be paid.

24. However the negotiations were to no avail and at a meeting on 22 April 2010 it was common ground that no agreement could be reached.

25. On 6 May 2010 the parties terminated the Agreement for Lease pursuant to clause 2.2(c).

26. North East commenced proceedings by Writ in May 2012. It alleged that Woolworths and Masters had breached clause 2.2 of the Agreement for Lease. In particular, North East contended that there was no genuine disagreement between the parties in relation to the calculation of the Landlord's Works Costs, and the tenant's contribution to those costs, or, if there was such a disagreement, Woolworths had not acted reasonably or in good faith to resolve it. North East alleged that Woolworths terminated the Agreement for Lease for ulterior reasons. The reasons alleged were first, that the calculated construction costs and Woolworths' required contribution to those costs exceeded Woolworths' undisclosed budget (in the sum of $1.7m); secondly, that Woolworths had determined to acquire an alternative site in Bendigo instead of proceeding with the development of the Strathdale site; thirdly, that Woolworths perceived that the opposition of the Council and residents was an obstacle to developing the Strathdale site; and fourthly, that Woolworths perceived that North East had funding difficulties.

The Trial Judge's decision

27. The Trial Judge held that Woolworths had breached clause 2.2(b) in that it failed to act reasonably and in good faith to resolve any differences they may have in relation to North East's determination of the Landlord's Works Costs, the amount of the tenant's contribution to those costs and the manner in which the contribution was to be made.

28. The Trial Judge held that as at 1 April 2010 and 18 April 2010 there was no genuine disagreement between the parties as to the calculation of the Landlord's Works Costs.

29. He held that on 31 March 2010 Rider Hunt had provided its estimate of the tenant's contribution amount in the sum of $3,247,195, and that on 6 April 2010 Rider Hunt arrived at a lower than previous Landlord's Work Costs amount of $11,516,809, which resulted in a reduced tenant's contribution amount of $2,941,169.

30. The Trial Judge observed that these amounts for Woolworths' contribution under clause 2.2(b) of the Agreement for Lease were lower than North East's formal estimate of the tenant's contribution amount provided on 3 March 2010, in the sum of $3,972,421.

31. The Trial Judge found that Woolworths prevaricated, doing no more than telling North East that its assessment of the Landlord's Works Costs and the tenant's contribution were "too high", without indicating what those differences were or how their cost should be estimated. The Judge found that Woolworths had its own maximum budget which it had not disclosed to North East (ie. the $1.7m amount). He found that Woolworths had identified another site in Bendigo and had resolved to abandon its interest in the Strathdale site in order to pursue the development of the alternative site. Finally, he held that Woolworths had unjustified concerns about the ability of North East to proceed with and complete the construction and concerning the attitude of the local Council to the development.

The Court of Appeal decision

32. In a lengthy and very detailed decision the Court of Appeal overturned the Trial Judge's decision. By reference to the relevant authorities, the Court said that the contractual duty to act reasonably and in good faith encompasses the following basic obligations [99]:-

(a) to act honestly and with fidelity to the bargain;
(b) not to undermine the bargain or the substance of the contractual benefit bargained for;
(c) to act reasonably and with fair dealing having regard to the interests of the parties (which will, commonly, at times be in conflict), and to the provisions and objectives of the contract, objectively ascertained;
(d) the obligation does not require that a party subordinate its legitimate interests to those of the other party;
(e) the content of the obligation is informed by the contractual, commercial and factual context.

(The Court cited the following authorities – *Paciocco v. Australia & New Zealand Banking Group Limited* [2015] FCAFC 50; [2015] 236 FCR 199, 273 [288]-[289] and [209]; *Esso Australia Resources Pty Ltd v. Southern Pacific Petroleum NL* [2005] VSCA 28 [228]; *Macquarie International Health Clinic Pty Ltd v. Sydney South West Area Health Service* [2010] NSWCA 268 [12], [13], [17], [137], [147]; *United Group Rail Services Limited v. Rail Corporation NSW* [2009] NSWCA 177; (2009) 74 NSWLR 618, 634-40 [56]-[77]; *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd* (1991) 24 NSWLR 1, 22-7).

33. The Court of Appeal observed at the outset [100] that the Trial Judge's conclusions the subject of the appeal largely consisted of inferences drawn from primary facts that the Judge found were established by the evidence. The Court set out the principles relating to the drawing of inferences in civil cases (101):-

(a) any inference must be based on facts established by admissible evidence;

(b) the process of reasoning must constitute a valid inference, as distinct from speculation or guesswork;

(c) where the inference is drawn in favour of a party which bears the burden of proof in the case, the conclusion must be "the more probable inference" from those facts. In other words, the inference drawn by the Judge must be reasonably considered to have a greater degree of likelihood than any competing inference;

(d) in determining whether an inference is to be drawn as a matter of probability, the tribunal of fact is not required to consider each primary fact, established by the evidence, in isolation. Rather, the Court considers the totality of those facts together, giving effect to their united combined force.

(The Court cited the following authorities in support of the above principles - *Luxton v. Vines* [1952] HCA 19; (1952) 85 CLR 352, 358; *Plomp v. R* [1963] HCA 44; (1963) 110 CLR 234, 242; *Holloway v. McFeeters* [1956] HCA 25; (1956) 94 CLR 470, 481-81; *Naxakis v. Western General Hospital & Anor.* (1998) 197 CLR 269, 284-5 [45]; *Transport Industries Insurance Co Limited v. Longmuir* [1997] 1 VR 125, 129-130 and 141; *Chapman v. Cole* [2006] VSCA 70 [14]; (2006) 15 VR 150, 154; *Chamberlain v. R (No. 2)* [1984] HCA 7; (1984) 153 CLR 521, 535-536; *Shepherd v. R* [1990] HCA 56; (1990) 170 CLR 573; and *R. v. Bayden-Clay* [2016] HCA 35; (2016) 334 ALR 234 [4], [70]-[71]).

34. The Court of Appeal determined that it was necessary to examine closely the record of contemporary communications [112]:-

"*The course we propose to adopt is to set out those communications and the evidence of the witnesses that were collateral to those communications in strict chronological order. In some ways, it will make this part of our reasons laborious; but, we see no alternative. The contention that the judge misunderstood the evidence that was before the Court is at the heart of this appeal*".

35. By undertaking an extremely detailed examination of the communications and the relevant evidence given on behalf of the parties, the Court found that the factual findings made by the Court below which were the subject of the appeal, were incorrect, and that based upon the correct facts North East's case against Masters and Woolworths for breaching the obligation to act reasonably and in good faith was not established.

36. The Court listed [92] the twenty separate grounds of appeal relating to the Trial Judge's finding that Woolworths and Masters had breached their obligations under clause 2.2(b) and (c) of the

Agreement for Lease. Each of the grounds related to asserted erroneous findings of fact or the failure to make certain findings of fact.

37. The Court of Appeal upheld all grounds. In reaching its conclusions it painstakingly examined each communication, oral or documentary, and each piece of evidence relevant to the factual issue at hand. What flowed from the Court's findings was the comprehensive debasing of the finding that Woolworths or Masters had not acted reasonably and in good faith in relation to its obligations under the Agreement for Lease.

38. The primary findings by the Court were:-

(a) ground 5.4(e)([92] and [103]-[182]) – contrary to the Judge's finding that on 29 March 2010 Rider Hunt provided to Woolworths and Masters its own estimate of the tenant's contribution under clause 2.2(b) in the sum of $3,247,195, what the evidence showed was that it was Vaughan who submitted that figure in its spreadsheet. When Mr McDonald (Rider Hunt) made amendments to the spreadsheet and submitted them to Woolworths it was plain that he had assessed the difference in cost between the proposed Masters store at Strathdale, and a generic Bunnings brief, was $2,573,493.26, and that he had concerns about the propriety of a further $2,312,181 of the figure submitted by North East ([103]-[182]);

(b) grounds 5.4(a), (b), (c) and (d) ([92] and [225]-[254]) – contrary to the Judge's finding that the revised North East offer of 6 April 2010 as to the clause 2.2(b) contribution, in the sum of $2,941,169, was not accepted because it exceeded Woolworth's "undisclosed budget" amount of $1.7m which Woolworths had fixed as its limit for the Strathdale store, the Court of Appeal found that such a conclusion was not reasonably open on a proper assessment of the evidence ([225]-[254]);

(c) grounds 5.4(f) and (h) ([92] and [183]-[197]) – contrary to the Judge's finding that between 12 and 18 April 2010, Rider Hunt arrived at or agreed with Vaughan's estimate of $11,516,809, which equated to a clause 2.2(b) amount of $2,941,169, the Court of Appeal said that the evidence did not demonstrate any such thing. The Court of Appeal set out a chronology of the relevant letters and details of meetings that passed and occurred between the respective solicitors from North East and Woolworths, and between Vaughan's and Rider Hunt representatives, and demonstrated clearly that they did not evidence any such agreement;

(d) the other grounds – the position with the other grounds was the same. The Court of Appeal demonstrated by a detailed chronological summary of the communications between the relevant parties, that the conclusions reached by the Trial Judge were quite simply not supported by the evidence.

Comments regarding the case

39. Standards Australia has or is about to release the AS1100 form of contract. This contract is to replace the AS2124-1992, AS4000-1997 and AS4902-2000 forms of contract. It contains for the first time an express term requiring both parties to act in good faith.

40. Whilst the Court of Appeal had no difficulty in stating [99] the basic obligations encompassed by a contractual duty to act reasonably and in good faith, the application of those obligations to the particular facts of a case to determine whether there has a been a breach thereof, is likely to be an unpredictable and uncertain matter in all but the clearest of cases.

41. The present case demonstrates that very point. We have a Trial Judge who obviously formed a view that Woolworths and Masters embarked on a course of feigned negotiations after forming an early view that they did not want to proceed with the agreement that had been entered into. The Trial Judge drew adverse inferences as to their motives.

42. But the Court of Appeal disagreed with all of the inferences which the Trial Judge drew based upon the evidence. What the Court of Appeal's decision demonstrated in spectacular fashion was that even though one may form an adverse impression as to the motivations or intentions of a party, there needs to be factual evidence which proves that this was the case. The extremely detailed examination of the relevant evidence by the Court of Appeal demonstrated that the relevant evidence did not support the view the Trial Judge appeared to have formed as to Woolworths' and Masters' motivations, namely that at an early point in time they had an ulterior motivation that they did not want to go ahead with the agreement.

43. The case also highlights that inferences must be based on facts established by admissible evidence. The Court of Appeal observed [100] and [101] that of the multiple grounds of appeal listed at [92], most related to inferences drawn by the Trial Judge based upon primary facts that were established by the evidence. The problem with the Trial Judge's decision was that the inferences/conclusions he drew were based on "*facts*" which were not facts supported by the evidence.

44. On the issue of distinguishing between speculation and inference the following statement by Beach J in *Siegwerk Australia Pty Ltd (in liquidation) v. Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443, [87], should be kept in mind:-

> "*[87] There is a distinction between inference and conjecture even if the reasoning process occurs on a continuum in which there is no bright line division (Seltsam Pty Ltd v. McGuiness (2000) 49 NSWLR 262 at 275 [84] to [88] per Spigelman CJ). A conjecture, even though plausible, is no more than a guess, whereas an inference is a deduction from the evidence. If the deduction is reasonable, the inference may rise to legal proof (Jones v. Great Western Railway Co (1930) 144 LT 194 at 202). But there must be objective facts from which the inference could be drawn, otherwise what is left is mere speculation or conjecture (Caswell v. Powell Duffryn Associated Collieries Limited [1940] AC 152 at 169 and 170 per Lord Wright)*".

ECOSSE PROPERTY HOLDINGS PTY LTD v. GEE DEE NOMINEES PTY LTD

[2017] HCA 12.

CONSTRUCTION OF CONTRACT – PROVISIONS IN A LONG-TERM FARM LEASE – AMBIGUOUS TERMS ENABLING EVIDENCE OF SURROUNDING CIRCUMSTANCES TO BE ADMITTED INTO EVIDENCE – PRINCIPLE THAT THE TERMS OF A COMMERCIAL CONTRACT ARE TO BE CONSTRUED OBJECTIVELY AS A REASONABLE BUSINESS PERSON IN THE POSITION OF THE PARTIES WOULD HAVE CONSTRUED THEM – LIMITS OF THIS PRINCIPLE

1. By lease made 19 November 1988 between Westmelton (Vic) Pty Ltd as lessor and Mr Peter Morris as lessee, Westmelton leased 12.15 hectares of land to Morris. The land was at that time part of a larger parcel of land of nearly 112 hectares of which Westmelton was the registered proprietor. The larger parcel of land was one of three contiguous "broadacre" lots that Westmelton was subdividing in stages for residential development. At the time of entry into the lease the current planning scheme restrictions on freehold subdivision prevented the freehold sale of the leased land.

2. On 7 November 2011, a separate title was issued in respect of the leased land, and since that time, it was assessed seperately for rates and land tax. The leased land as at the time of the litigation still had not been subdivided, and until the lease expires, it could not be subdivided. It remained rural farming land.

3. The lease was comprised of a standard form memorandum of agreement for a farm lease. The respective solicitors for the parties made various deletions and additions to the terms. The term of the lease was for 99 years commencing 1 November 1988. The two clauses of the lease central to the determination of the case were clauses 13 and 4:-

   "*13. The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of $70,000 and as a result thereof the parties have agreed to enter into this lease for a term of ninety-nine years in respect of which the total rent thereof is the sum of $70,000 which sum is hereby acknowledged to have been paid in full*".

   "*4. And [the Lessee] also will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).*".

4. It was evident from clause 13 that the lease resulted from an earlier intended sale by Westmelton to Morris and that the single lump sum rental payment of $70,000 was of the amount which had earlier been agreed as the price for the sale. The clause indicated that the purpose of the parties entering into a 99 year lease was to replicate the sale which planning restrictions had prevented.

5. In 1993 Ecosse Property Holdings acquired the leasehold reversion from Westmelton, and on 15 October 2004 Morris assigned and transferred the term of the lease to Gee Dee Nominees Pty Ltd.

6. On 7 November 2011 a separate title was issued in respect of the leased land and since then the land was assessed seperately for rates and land tax. The land was not permitted to be subdivided and was to remain that way until the expiration of the 99 year term.

7. It was not disputed by the parties that clause 4 of the lease was ambiguous and the issue was whether the term obliged the lessee to pay all rates, taxes, assessments and outgoings in respect of the leased land, or instead only obliged the lessee to pay those rates, taxes, assessments and outgoings that were levied on the lessee as tenant.

8. The primary judge (Croft J) held in favour of the former. On appeal, a majority of the Court of Appeal (Santamaria and McLeish JJA, Kyrou JA dissenting), held in favour of the latter. In the High Court, a majority (Kiefel, Bell, Gordon and Gageler JJ, Nettle J dissenting), held in favour of the former, namely that clause 4 obliged the lessee to pay all rates, taxes, assessments and outgoings.

9. It is interesting to observe that some of the best legal minds in the country should reach differing conclusions as to the meaning of a relatively straightforward, albeit ambiguous clause in a lease.

Decision of the majority in the High Court

10. The majority noted that the judges in the Court of Appeal had correctly acknowledged that each of the constructions proposed by the parties was plausible [15].

11. The majority indicated that a syntactical approach to determining which construction was to be preferred was of little assistance in circumstances where the amendments to the standard farm lease were poorly crafted [15]. Gageler J who agreed with the members of the joint judgment, was highly critical of the drafting of clause 4:-

"*[51] Clause 4 can only be so construed for what it is: a clumsily tailored variation of an ill-fitting off-the-shelf precedent. To bring linguistic and grammatical precision to its construction would be to burden the clause with more weight than its jumble of words will bear*".

12. Both Gageler J and the members of the joint judgment (Kiefel, Bell and Gordon), recognized that in circumstances such as these, where the agreement was poorly crafted, the ambiguity was to be resolved by applying the principles relating to commercial contracts. Gageler J said:-

"*[52] The competing constructions of cl 4 being open on its language, and the textual indications in favour of each being at best equivocal and at worst conjectural, the choice between them comes down to deciding which is more reasonable considered as a matter of "commercial efficacy or common sense"*".

13. The members of the joint judgment said:-

"*[16] It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it*".

14. They also said that clause 4 was to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease [17].

15. They pointed in particular to the opening part of clause 13 which explained that the parties' intention was to re-create as closely as possible in the lease, the situation that would have existed had they been able to convey a freehold estate in the land. They did this by conveying a leasehold interest for almost a century and for a fixed sum of $70,000 which had been paid in full.

16. Consistent with that intention, the majority concluded that it made no commercial sense for the lessor to remain liable for ongoing liability throughout the 99 year period for the payment of rates, taxes and other outgoings [26].

17. The members of the joint judgment said that even putting to one side the intention evinced by clause 13, the surrounding facts and circumstances which a reasonable businessperson in the position of the parties may be taken to have known, would have pointed to the same conclusion [19] and [25]. They included the length of the term, the prepayment of a sum which was equivalent to the market value of the land, the removal of the covenants in the lease restricting the lessee's use of and capacity to deal with the land and the lessors rights of inspection and termination for breach and re-entry. In addition the members of the majority judgment said that a further surrounding circumstance of which the reasonable businessperson would be aware, was that the lessor company was in receivership and accordingly it must be thought highly unlikely that a receiver would agree to burden the lessor company with uncertain financial obligations over the term of a 99 year lease.

18. The members of the joint judgment concluded that:-

"*[27] On its proper construction cl 4 imposes on the lessee the obligation to pay all rates, taxes, assessments and outgoings whatsoever that are payable during the term of the lease in respect of the land. This construction accords with the commercial aim of the parties that the lessee assume the position of owner, so far as a lease may provide, with all of an owner's liabilities*".

19. Gageler J's judgment was along similar lines to the joint judgment.

Nettle J's dissenting judgment

20. Justice Nettle's dissenting judgment was a strong endorsement of the majority decision of McLeish and Santamaria JJA in the Victorian Court of Appeal.

21. His judgment is a powerful one in which he made clear that in his view the true meaning of clause 4 was to be ascertained by construing the terms of the agreement as a whole, rather than substituting that process with an undue reliance upon the precept that commercial contracts are to be construed as it is thought an honest and reasonable businessperson in the shoes of the parties, would have understood them. It is tolerably clear from Nettle J's judgment that the use of this precept to resolve the ambiguity should not be substituted for the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used, interpreted in the light of the relevant factual situation in which the contract was made (refer [97] and [98]). At [98] he said:-

"*Poor drafting may justify a court being more ready to depart from the natural and ordinary meaning of the terms of a contract, and no doubt, the poorer the drafting, the less willing a court should be 'driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention'. But poor drafting provides 'no reason to depart from the fundamental rules of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made'. Where there is ambiguity which permits of two alternative and semantically not improbable interpretations, construction in accordance with what it may be supposed would be the approach of honest and reasonable businesspersons may assist in choosing one such alternative over the other. But where, as here, the language and surrounding circumstances of a commercial contract present a choice between, on the one hand, a plain, ordinary and commercially not irrational meaning of a clause and, on the other, a meaning which is significantly removed from the natural and ordinary meaning of the terms of the clause, which ill-accords with other provisions of the agreement, and which in the end produces an outcome that is more commercially acceptable from one of the parties' point of view only, the precept runs out of application. Unless the Anglo-Australian objective theory of contract is now to be cast aside, the commercial approach to construction is not a license to alter the meaning of a term that is 'clear and fairly susceptible of one meaning only' to achieve a result that the court may think to be reasonable. The court is not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed. Where, as here, all things considered, the words of a clause are fairly susceptible of only one meaning, they must be given that effect*" (footnotes not included).

22. Nettle J concluded that the obligation of the lessee respondent under clause 4 was limited to the payment of rates and taxes payable by the lessee as tenant. The lessee was not obliged to pay all rates and taxes in respect of the leased premises. The reasons why he so found are summarized below.

23. First, he adopted a different construction to that of the majority regarding clause 13. The majority held that the commencement of clause 13 was an explanation of why the parties entered into a lease rather than a sale and purchase, which had been intended. They explained that in circumstances where the parties had been thwarted in their attempts to convey a freehold estate in the land, they intended to replicate to the greatest extent possible that outcome by way of a lease for almost a century with a $70,000 rental which was to be paid at the outset. In those circumstances a reasonable businessperson in the parties' position would have intended that the lessor pay nothing by way of rates and taxes.

24. Nettle J disagreed with this construction of clause 13. He agreed with McLeish JA's construction, and said that the opening words of clause 13 were expressed in the past tense and expressed that, whereas previously it was their intention to enter into a sale and purchase, once that proved impossible, the parties resolved instead to enter into a 99 year lease [74].

25. Secondly, Nettle J said that in utter opposition to the notion of the parties intending the agreement to replicate as far as possible a sale and purchase, imposed an unqualified obligation to deliver up the land at the expiration of the term, and without any compensation for improvements made in the meantime [75]. The idea that the parties just simply overlooked the need to provide for what was to occur at the end of the lease was unrealistic because they were commercial parties who both had legal advisors acting in relation to the matter [76].

26. Thirdly, the fact that the total rent of $70,000 was commensurate with the parties' estimate of the market freehold value of the land at the time of entry into the lease, did not point unambiguously in favour of a construction of clause 13 that imputed an intention to the parties to effect a transaction as close as possible to a sale and purchase of the land. Both parties accrued benefits under the lease – the lessor, the value of the reversion and the lessee avoided liability for any future rates and taxes that may be levied upon the owner of the land [78].

27. Fourthly, obligations under the lease had obliged the lessee to keep the land free of vermin and noxious weeds (cl. 6); not to damage timber or trees except for fencing and domestic purposes (cl. 7); not to commit any nuisance and not to do anything which might increase the cost of insurance (cl. 12); and to keep the premises in good repair and condition for the purpose of delivery up at the end of the lease (cl. 10), were just the kind of covenants to be expected in a lease of land, and as such they were an objective indicator of the nature of the lease-like relationship that the parties intended to achieve. This points away from an intention to create a transaction which as far as possible resembled a sale and purchase of the land.

28. Fifthly, Nettle J held that the lessor's contention that the financial consequences of upholding the lessee's preferred construction of clause 4 would involve "*millions and millions of dollars*" was overstated. At the time of entry into the lease general rates imposed by municipal councils were levied, subject to some limited exceptions, on a lessee as the occupier of the land. Water and sewerage rates were recoverable by the relevant authority from the occupier of land. And land tax

was levied on the total unimproved value of all land of which a person was the owner, however s42 of the relevant Act deemed a lessee of land to be liable for land tax "*as if owner*", and to the exclusion of the legal owner, in circumstances where, in the opinion of the Commissioner, the interest of the legal owner "*is lessened by the covenants of any lease*", as, for example, might be said of a 99 year lease which expressly precluded a power of earlier determination and right of re-entry [80]-[82].

29. Sixthly, as to the proper construction of clause 4, Nettle J said that the three struck through deletions (refer earlier to clause 4), which, in the event of an ambiguity can be used as an aid in the construction of what remains in the clause, were intended to have their plain and ordinary effect. And accordingly the deletion "~~*excepting land tax*~~" meant that the lessee was to pay any land tax; the effect of the deletion "~~*landlord or*~~" was to limit the rates and taxes for which the lessee was liable; and the deletion "~~*(but a proportionate part to be adjusted between Landlord and Tenant if the case so requires)*~~", was consistent with the first and second deletions because, by reason of those deletions the lessee was no longer required to pay a proportion of any rates and taxes that the lessor might become liable to pay in its capacity as owner, but was required to pay all rates and taxes that the lessee might become liable to pay in its capacity as tenant [85]-[90].

30. In relation to the lessor's argument before the High Court which focused on the commercial consequences for the lessor of the construction of clause 4 as adopted by the majority of the Court of Appeal, Nettle J rejected such argument. He said that the thrust of the submissions by the lessor was that the consequences would be so onerous that, judged according to the standards of an honest and reasonable businessperson, it could not rationally be supposed that the parties intended to bring about that result. The lessor argued that commercial reality demanded a construction which yielded to what business common sense required [93]. Nettle J rejected the lessor's argument saying that it had not been established that the parties would necessarily, or even probably, have considered that the lessor would be worse off by requiring the lessee to pay all of the rates and taxes, including land tax, which the lessee might become liable in its capacity as tenant to pay in respect of the leased land, than by requiring the lessee to pay a proportion of all rates and taxes, other than land tax, incurred in respect of the land, as the lease initially provided [93] and [94].

470 ST KILDA ROAD PTY LTD v ROBINSON [2017] FCA 597

BUILDING AND CONSTRUCTION INDUSTRY SECURITY PAYMENT ACT 2002 (Vic) S.14 – FALSE STATUTORY DECLARATION BY THE DIRECTOR OF THE BUILDER IN SUPPORT OF A PAYMENT CLAIM – HELD THAT BY DOING SO THE DIRECTOR HAD ENGAGED IN MISLEADING AND DECEPTIVE CONDUCT UNDER S.18 OF THE COMPETITION AND CONSUMER ACT 2010 (Cth)

1. The interest of this case was the use of the Competition and Consumer Act 2010 (Cth), Schedule 2 (Australian Consumer Law), Sections 18 and 236 as the basis for recovering money from the Chief Operating Officer of the building company who had made a false statutory declaration in support of a payment claim under a building contract.

2. Mr Robinson on behalf of the builder Reed Constructions Australia Pty Ltd, made a statutory declaration in which he declared that all sub-contractors or suppliers of materials who were or at any time had been engaged on the work under the contract had been paid in full all monies which had become payable to the sub-contractor under the terms of the sub-contract or to the supplier of materials under the terms of agreement for supply

3. The statutory declaration was submitted to the Principal, 470 St Kilda Road Pty Ltd, in support of payment claim No 15 under the Building Contract.

4. Payment in the sum of $1,426,641.70 was made in respect of payment claim No 15.

5. The Court held that Mr Robinson's statutory declaration that to the best of his knowledge and belief having made all reasonable enquiries, all workmen, sub-contractors and suppliers had been paid in full amounts, which had become due to them, was materially untrue. At a minimum, unpaid sums to sub-contractors and suppliers totalled $161,401.00.

6. The evidence of the principal's relevant personnel was that if Mr Robinson had not signed the statutory declaration or if he had signed a statutory declaration disclosing the true position, payment of claim No 15 would not have been approved or paid.

7. The Court found that the principal acted in reliance upon the contents of the statutory declaration and thereby suffered loss in the sum of $1,426,461.70 plus interest. Mr Robinson was ordered to pay these amounts.

UPDATE REGARDING THE "TRUE RULE" STATED IN CODELFA CONSTRUCTION PTY LTD v STATE RAIL AUTHORITY OF NEW SOUTH WALES (1982) 149 CLR 337

1. Even since Mason J's statement of the "*true rule*" in *Codelfa*, there has been much discussion in the cases and extrajudicially about whether the rule is that an ambiguity in the language of the contract must be shown before a Court interpreting the contract may have regard to evidence of circumstances surrounding entry into the contract.

2. In *Codelfa* Mason J famously said (at 352):

> "*The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning".*

3. Ironically, Mason J's statement itself has been seen as ambiguous and there has been a litany of cases since Codelfa in which differing views have been expressed, with some Judges stating that evidence of circumstances surrounding the entry into the written contract cannot be admitted without first passing through an "*ambiguity gateway"*, whilst other Judges have stated that such evidence is admissible whether the language is ambiguous or not.

4. Indeed in *Cherry v Steele-Park* [2017] NSWCA 295, [76], Leeming JA said that:

> *"There is now a deal of authority for the proposition that whether there is in truth a constructional choice available to a written contract cannot be determined without first at least considering evidence of surrounding circumstances".*

5. In the recent High Court case of *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, 116-117, [46]-[51]* French CJ, Nettle and Gordon JJ set out the legal principles concerning the interpretation of written contracts, noting at [52] that, *"These observations are not intended to state any departure from the law as set out in Codelfa Construction Pty Ltd v State Rail Authority (NSW)".*

6. Unfortunately the statement by the Justices of the applicable legal principles has not resulted in clarifying whether the "*ambiguity gateway"* (the phrase coined by Leeming JA in *Cherry v Steele-Park* exists or not.

7. This lack of clarity is evidenced by the fact that since *Mount Bruce*, there have been different views expressed in the cases. In *Cherry v Steele-Park [2017] NSWCA 295,* and in *WIN Corporation Pty Ltd v 9 Network Australia Pty Ltd [2016] 341 ALR 467 at [57],* it was held that evidence of surrounding circumstances was admissible without the need to first establish that there was an ambiguity in the language of the contract.

8. On the other hand, in the cases of *Adaz Nominees Pty Ltd v Castleway Pty Ltd [2017] VSC 578 [48] ,* and *Melbourne Linh Son Buddah Society Inc v Gippsreal Limited [2017] VSCA 161 at [139],* it was held that when interpreting the meaning of a written contract if the language was unambiguous or susceptible to only one meaning evidence of surrounding circumstances could not be adduced to contradict that meaning.

Commercial Contracts – Evidence of surrounding circumstances is admissible whether or not there is an ambiguity in the language.

9. Notwithstanding the continued uncertainty regarding whether evidence of surrounding circumstances is admissible where no ambiguity has been identified, it would appear that the High Court *in Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12; 91 ALJR 486,* has decided that in the case of commercial contracts evidence of surrounding circumstances is admissible whether or not the language is ambiguous. Kiefel, Bell and Gordon JJ at [16] said:

> "*16. It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract placed in the circumstances [7]. In a practical sense, this requires that the reasonable businessperson be position of the parties. It is from that perspective that the Court considers the surrounding the contract and the commercial purpose and objects to be achieved by it [8]".*

10. Nettle J at [73] said:

"73. As the majority in the Court of Appeal recognized [59], it is necessary to construe cl 4 objectively by reference to what a reasonable person in the position of the contracting parties would have understood to be meaning of its language [60] when read in light of the document as a whole and the surrounding circumstances known to the parties at the time of the transaction [6]".

Scope of evidence of surrounding circumstances

11. In *Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896* Lord Hoffmann whilst excluding from the admissible background evidence, the previous negotiations of the parties and their declarations of subjective intent, he famously said that:

"Subject to the requirement that it should have been reasonably available to the parties ..... it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".

12. Lord Hoffmann qualified that statement in *Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251 at [39]:*

"When in Investors Compensation Scheme Limited v West Bromwich Building Society [1998] I WLR 896, 913, I said that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background".

13. In *QBE Insurance Australia Limited v Vasic [2010] NSWCA 166 at [35]* Allsop P said:

"It is clear from the binding Australian authorities that the scope of the surrounding circumstances, knowledge of which is to be attributed to a reasonable person in the situation of the contracting parties (not one or some only of them), is to be understood by reference to what the parties knew in the context of their mutual dealings. As Lord Wilberforce said, this does not involve a species of constructive notice. Constructive notice implies a degree of enquiry by reference to some external standard. Just because something is available to be found does not make it relevant, if the parties did not know of it. The reasonable person may be taken to know of things

that go beyond those that the parties thought to be important or those to which there was actual subjective advertence by the parties. Further, the circumstances may include such things as the legal context to the transaction, especially if a market is involved".

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